82-900

CASE NO.

in the Supreme Court of the United States

OCTOBER TERM 1982

CLIFTON RAY MIDDLETON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

I.

WHETHER THE LOWER COURT ERRED IN DENYING THE PETITIONER'S MOTION TO DISMISS, WHERE THE CLASSIFICATION OF MARIJUANA AS A SCHEDULE I CONTROLLED SUBSTANCE OF TITLE 21, *UNITED STATES CODE*, SEC. 812(c)(10), AS WELL AS THE STATUTES UNDER WHICH THE PETITIONER WAS CHARGED ON THE BASIS OF THIS CLASSIFICATION, ARE ARBITRARY AND IRRATIONAL?

II.

WHETHER, AS APPLIED TO A MEMBER OF THE ETHIOPIAN ZION COPTIC CHURCH FOR WHOM THE USE OF MARIJUANA IS AN INDISPENSABLE PART OF HIS RELIGION, THE STATUTES PROHIBITING THE POSSESSION AND IMPORTATION OF MARIJUANA VIOLATE THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION?

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The Petitioner, CLIFTON RAY MIDDLETON, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit, entered in the above-styled case on November 1, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals, printed in Appendix A hereto, *infra*, (App. 1-15) is reported at __ F.2d __ (5th Cir. 1982).

JURISDICTION

The judgment of the Court of Appeals was entered on November 22, 1982, Appendix B, *infra* (App. 16-17). No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Rule 22, *Rules of the United States Supreme Court.*

STATUTES INVOLVED

The Federal statutory provisions involved, 21 U.S.C. 841(a)(1), 846, 952(a) and 963, are set forth in Appendix C, *infra* (App. 18-19). The statutory authorization for appeals from final judgments of the Circuit Courts, 28 U.S.C. 1254(1), is set forth in Appendix D, *infra* (App. 20).

STATEMENT OF THE FACTS

On April 20, 1972 the Petitioner was indicted in a seven count indictment charging offenses allegedly committed on April 11, 1972. Count I charged importation of approximately 3½ pounds of marijuana in violation of 21 U.S.C. Sections 952(a) and 963. Count II charged that the defendant possessed with intent to distribute that same volume of marijuana in violation of 21 U.S.C., Sections 841 and 846. The remaining counts do not concern these proceedings.

The defendant moved to dismiss the indictment, alleging that the statutory prohibitions pertaining to marijuana were unconstitutional *per se* and as applied to him. The motions were denied and the denial affirmed by the Court of Appeals. (See App. A).

The jury found the Petitioner not guilty of possession of marijuana with intent to distribute but convicted him of the lesser included offense of possession of marijuana, and the Petitioner was sentenced to nine months imprisonment on Counts I and II, to be served concurrently with each other.

REASONS FOR GRANTING THE WRIT

1. Whether the Circuit Court erred in affirming the lower court's denial of the Petitioner's pre-trial motion to dismiss the alleged marijuana violation on grounds of due process and equal protection of the laws, in violation of the Fifth Amendment of the United States Constitution where the classification of cannabis as a Schedule I controlled substance under Title 21,

United States Code, Section 812(c)(10) and the statutes under which the Petitioner was charged are arbitrary and irrational?

The first question presented concerns a fundamental question of this Court's earlier interpretation on due process grounds of statutory enactments which, due to later events, are declared invalid due to arbitrariness and irrationality. It requires this Court to extend earlier decisions such as *Chastleton Corporation v. Sinclair*, 264 U.S. 543 (1924); *United States v. Carolene Products*, 304 U.S. 144 (1938); *South Carolina Highway Department v. Barnwell Brothers*, 303 U.S. 177 (1938); *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955); *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973); and *Craig v. Boren*, 429 U.S. 190 (1976).

Although federal statutes are presumptively valid, upon review a court may generally find such acts invalid where it is shown that the statute in question bears no rational relationship to a legitimate legislative purpose. *Craig v. Boren*, *United States Dept. of Agriculture v. Moreno*, *Williamson v. Lee Optical of Oklahoma, Inc.*, *United States v. Carolene Products*, and *South Carolina Highway Dept. v. Barnwell Bros.*, all *supra*. A legislative declaration of facts may be reasonable when enacted but will not insulate the statute from judicial review, where, as here, the facts, if they ever existed, no longer do. *Leary v. United States*, and *Chastleton Corp. v. Sinclair*, both *supra*. "Regulations under the police power, although valid or presumed valid when made, may become arbitrary and irrational in the light of later events." *Chastleton Corp. v. Sinclair*, *id.*, at 547-48.

In *Leary v. United States, supra,* this Court was presented with a challenge to 21 U.S.C. 176(a), which provided that persons who possessed marijuana in the United States would be presumed to know that marijuana had been illegally imported and after surveying a mass of reports, studies and articles by experts on the cultivation, importation and distribution of marijuana, concluded that in light of the empirical data, the legislative presumption was invalid. *See also Turner v. United States,* 396 U.S. 398, 90 S.Ct. 642, 24 L.Ed2d 610 (1970); *Block v. Hirsch,* 256 U.S. 135 (1921).

In *United States v. Carolene Products Co., supra,* this Court stated, at 314 U.S. 153-154:

> "(W)e recognize that the constitutionality of a statute, valid on its face, may be assailed by proof of facts tending to show that the statute as applied to a particular article is without support in reason because the article, although within the prohibited class, is so different from others of the class to be without with reason for the prohibition."

Such is the case here. Emperical evidence and expert testimony, clearly demonstrated that marijuana, "although within the prohibited class, is so different from others of the class as to be without the reason for the prohibition. . . ." The Circuit Court's refusal to employ the data and declare the classification of marijuana irrational or unreasonable must be reversed.

21 U.S.C. Section 812 established five (5) schedules of controlled substances: Schedules I through V.

Subsection (b) of the statute requires that a drug or other substance placed in Schedule I must be one:

(a) which has a high potential for abuse;

(b) which has no currently accepted medical use in treatment in the United States;

(c) for which there is a lack of accepted safety for its use under medical supervision.

Also in Schedule I are drugs such as heroin, morphine, barbiturates, codeine, LSD, mescaline and psilocybin. Opium and cocaine are Schedule II controlled substances[1] Amphetamines are classified as Schedule III controlled substances.[2] Alcohol and tobacco are not scheduled as controlled substances.

The lower court heard testimony from several defense witnesses, the first being Dr. Thomas Ungerleider, a psychiatrist and professor of psychiatry at the UCLA Medical Center, a President Nixon appointee to the National Commission on Marijuana and Drug Abuse

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[1]Schedule II controlled substances are those defined as having a high potential for abuse which may lead to severe psychological or physical dependence but which have a currently accepted medical use and treatment in the United States or a currently accepted medical use with severe restrictions.

[2]Schedule III controlled substances are those which have a lesser potential for abuse than the drugs or substances in Schedules I and II, where abuse of these substance may lead to moderate or low physical dependence or high psychological dependence, and which have a currently accepted medical use and treatment in the United States.

and a President Carter appointee to the Drug Abuse Task Force of the Mental Health Commission.

The National Commission on Marijuana and Drug Abuse concluded: that there was no causal relationship between the use of marijuana and violent crime, loss of motivation (use of other drugs, chromosone or brain damage; that marijuana was neither physically nor psychologically addictive; and that the use of marijuana was not a threat to the public health, safety, or welfare of the country. The Commission recommended that the penalties for the use of marijuana be eliminated.

Dr. Ungerleider also conducted a three year study funded by the National Cancer Institute on the therapeutic effects of the active ingredient of marijuana, tetrahydrocannabinol (THC, hereafter) the treatment of the nausea and vomiting many cancer patients suffer as a result of radiation therapy and chemotherapy. The result: THC helped alleviate nausea and vomiting in some patients, particularly those who had not been helped by compazine, the standard treatment.

Dr. Ungerleider testified that marijuana does not satisfy criteria used to define a Schedule I controlled substance and that in 1979, a Federal Food and Drug Administration Committee concluded that THC does not belong in Schedule I.

Dr. Ungerleider's testimony was corroborated by Dr. Lester Grinspoon, a psychiatrist and associate professor of psychiatry at Harvard Medical School who reviewed all of the prior-in-depth studies of marijuana conducted by official or semi-official commissions. The

first, the "Indian Hemp Drugs Commission" concluded that there was no evidence of any moral or mental deterioration as a consequence of the use of marijuana and posed no more of a threat to the public health than alcohol.[3]

The next was the New York Academy of Medicine's report entitled, *The Marijuana Problem in the City of New York* (1944) the "LaGuardia Report" which concluded that marijuana was not addictive, did not lead to crime, sexual overstimulation or any kind of psychological deterioration. Others included the National Commission on Marijuana and Drug Abuse, a study conducted at UCLA in 1972 which involved some 1400 students, the report of the Canadian Commission of Inquiry into the non-medical use of drugs, entitled *Cannabis* (1972) (the "LeDain Report") and a study funded by the National Institute of Mental Health which resulted in the publication of a book entitled *Ganja in Jamaica* (1975). Dr. Grinspoon concluded: there was insufficient clinical evidence to support much of the mythology and misinformation about marijuana; the use of marijuana did not lead to one's loss of motivation; there was no valid clinical evidence linking the use of marijuana to brain damage, gynechomastia (the development of breasts in young men), impairment of the body's immunity system, or chromosome damage. Also, there is no such thing as a "cannabis psychosis," it is impossible for a

[3]See also the testimony of Theres Andrysiak, project director of the UCLA study (S-III pp. 106-07, 109-10, 114) and Chris Chambers, a cancer patient whose use of marijuana was accompanied by the substantial relief from the nausea and vomiting he had been experiencing. References here are to the Original Record on Appeal before the Eleventh Circuit.

person to take a lethal overdose of marijuana and marijuana is clearly safer than alcohol or tobacco.

Dr. Grinspoon's professional opinion: marijuana is not a substance that has a high potential for abuse, nor is it a substance that has no currently accepted medical treatment in the United States, nor is there a lack of accepted safety for its use under medical supervision.

Robert Randell, who suffers from chronic optical glaucoma, was prognosed that he would suffer a complete loss of vision within three to five years notwithstanding treatment by conventional medical therapy. In 1973, Randell, noticed that the symptoms of his disease would disapear when he smoked marijuana and that they did not reappear when he smoked marijuana on a regular basis. In 1975, Mr. Randell was admitted into a thirteen-day experiment conducted at UCLA for the purpose of studying the effects of marijuana on vision. He discovered that while oral administration of THC is ineffective, smoking marijuana, *in tandem* with the use of some conventional medicines, was the therapy most effective in controlling his illness.

Except for one four month hiatus, Mr. Randell *has been supplied with marijuana grown and distributed by the federal government since 1976. Randell smokes ten government-supplied marijuana cigarettes per day.* He does not experience any intoxification and there has been no disintegration or deterioration of his visual capacity since he secured legal access to marijuana in 1976.

Dr. Jeffrey Schaeffer, a psychologist specializing in neuropsychology, the study of the behavior of the function of the brain, tested the effects manifested on the brain of along term heavy marijuana users. He administered psychometric tests to ten members of the Ethiopian Zion Coptic Church including the Petitioner. All of the subjects smoked marijuana at testing time had an exceedingly high amount of cannabinoid in their urine and blood. Dr. Schaeffer was unable to discover any evidence of any cognitive or mental function impairment.

Five medical reports were considered by the trial court. (See original record on appeal to the Eleventh Circuit, S-I Exs. A-E; S-V p. 92). The first neuropathy, found no evidence of any obvious changes in mental status. ("The people appeared to be alert, coherent, well-oriented and integrated with no evidence of any encephalopathy or intoxication.") The second noted (S-I Ex. "B") The Coptics smoke marijuana almost constantly and particularly in the Jamaican group of Coptics, many members have been smoking marijuana on a constant daily basis for more than forty years and found that the Coptics do not exhibit the acute or short-term side effects which have been commonly associated with marijuana. The Coptics do not get "high" or "stoned" and did not display any sensory distortion, lapses of attention, impaired intellectual or cognitive functioning, memory disturbances or impairment of concentration. The report documents a lack of the so-called "amotivational syndrome" which has been erroneously associated with marijuana use.

Many of the Jamaican Coptics examined, ranging to a 71 year old man, had been smoking marijuana daily

since early childhood with no apparent psychological illeffects: no depression, anxiety or organic brain syndrome.

Exhibits "C," "D" and "E" confirmed that members of the Ethiopian Zion Coptic Church are in good physical health and consume healthful, nutritional diets and that the nutritional health of Coptics in both Miami and Jamaica appeared good.

The foregoing evidence clearly demonstrates the arbitrariness in classifying marijuana, as a Schedule I drug. It does not meet any, let alone all, of the criteria used to classify controlled substances.

Marijuana *does* have a currently accepted medical use in treatment in the United States. 32 states authorize its distribution to qualifying physicians for medicinal purposes, such as the treatment of nausea and ill effects resulting from cancer therapy and the treatment of glaucoma. The federal government has recognized marijuana as having valid medical use. And on September 10, 1980, the Food and Drug Administration (FDA) approved the wider use of THC capsules for experimental treatment of nausea and vomiting in cancer patients, making THC available through the National Cancer Institute to about 4,000 specialists for their patients.

In *National Organization for the Reform of Marijuana Laws v. Drug Enforcement Administration*, 559 F.2d 735 (D.C. Cir. 1977) a Circuit Court ordered the DEA to reconsider new scientific and medical findings and recommendations on rescheduling marijuana but to date the order has not resulted in new hearings.

While the actions taken by the FDA and the D.C. Circuit Court of Appeals have cast grave doubts on the rationality of the classification of marijuana, and the DEA has not conducted court ordered hearings, bold state judiciaries have reacted with objectivity. In *State v. Zornes*, 78 Wash.2d 9, 469, P.2d 552 (1970), and *People v. McCabe*, 49 Ill.2d 338, 275 N.E. 407 (1971), the Supreme Courts of Washington and Illinois reversed convictions for possession of marijuana under a statute which classified marijuana as a narcotic, concluding that such a statutory classification was arbitrary and irrational.

See also: *People v. Lorentzen*, 387 Mich. 167, 194 N.W.2d 827 (1972); *People v. Sinclair*, 387 Mich. 91, 194 N.W.2d 878 (1972); *Raven v. State*, 537 P.2d 434 (1975); *State v. Anonymous*, 32 Conn. Sup. 324, 355 A.2d 729, (1976); *State v. Carus*, 18 N.J. Super.159, 286 A.2d 740 (1972); *Sam v. State*, 500 P.2d 291 (Okla. Ct. Crim. App. 1972).

It is time the irrational classification of marijuana as a Schedule I drug be so declared, especially in view of the DEA's refusal to conduct the very hearings needed to gain administrative and legislative review of that antiquated classification.

2. Whether the lower courts' rulings violated the Free Exercise Clause of the First Amendment to the United States Constitution by their rulings that the statutes prohibiting the possession and importation of marijuana applied against this Petitioner, an undisputed member of the Ethiopian Zion Coptic Church, for whom the use of marijuana is an indispensable part of the religion, and whether there was an equal violation

based upon the refusal to allow the Petitioner to present evidence to the jury on his First Amendment defense?

The second question presented concerns an equally fundamental question of the propriety of the Eleventh Circuit's analysis of this Court's decision in *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972). It requires the Court to review the "balancing" process employed by the Circuit Court in concluding that *Yoder's* applicability to a state's compulsory school attendance law is different in nature than the governmental interest involved in proscribing the mere possession of small amounts (3½ pounds) of marijuana employed exclusively in the exercise of religious tenets. Though no prior decision of this Court has exempted the religious use of marijuana from the general prohibition, no prior case has involved a Free Exercise assertion on behalf of a petitioner who is a member of an organized church and who clearly established the indispensability and centrality of marijuana to a *bona fide* system of religious belief.

The federal statute prohibiting the importation and possession of marijuana, as applied in this case, violated the Free Exercise Clause of the First Amendment. The Petitioner proved that he was a dedicated member of the Ethiopian Zion Coptic Church, that the church is a "religion" within the meaning of the First Amendment and that the use of marijuana is an essential portion of his religious practice. The lower courts' refusal to dismiss or to allow the presentment of a "free exercise of religion" defense to the jury cannot be tolerated by this Court.

Dr. Melanie Dreher, a doctorate in Anthropology and teacher of Anthropology at the Columbia University School of Public Health, testified without refute: although the church's members claim that the doctrine and symbolism of the church date back 6,000 years to the ancient Ethiopian Coptic Church, the connection between the two is revitalistic rather than historical. The Ethiopian Zion Coptic Church originated in the early 1940's under the leadership of a Jamaican named Lova Williams, a disciple of Marcus Garvey. Williams soon developed disciples of his own, among them Brother Laurenton Dickens, a church elder and a witness.

Today the Coptic community in White Horses, Jamaica is a normal, healthy and integrated community. There is a dwelling area of approximately thirteen houses, a tabernacle and a dining area. Much of the land has been cleared, roads have been developed on the property and most of the remainder of the land is under cultivation. It also engages in coal and coconut oil production. Several irrigation systems as well as a lumber mill have been constructed and are in operation.

Religion is the major organizing force of the Coptic community. Formalized prayer service begins at 3:00 a.m., and lasts until 6:00 a.m. Then the secular work of the church community is carried on from about 6:00 a.m. to 3:00 p.m., when the church members reconvene for another prayer service which lasts until 5:00 p.m. The church members reconvene at 8:00 p.m. for the third prayer service which usually lasts until 11:00 or 11:30 p.m. The services are ordinarily conducted in a building called the tabernacle. The service itself consists of a series of alternating hymns and psalms. All the

psalms must be memorized by each church member prior to his initiation into the church.

One of the brethren is responsible for filling the sacred pipe (or chalice) with marijuana and taking it to the chief presiding elder to be lit, whereupon the pipe is passed among the brethren. A separate pipe is lit for the women, who are segregated from the men during prayer services. Only those members of the church who have confessed will participate and smoke the pipe. A member who has transgressed the doctrine of the church, will have the pipe passed around him. New individuals and guests are not offered the pipe. The sacred pipe is smoked continuously during the entire service.

Although Coptics consider themselves to be Christians, they do not accept the belief that man and God are separate, as do other Christian faiths. The doctrine of the Ethiopian Zion Coptic Church is from two (2) sources: the King James version of the Bible. The Coptics view God as being embodied in every man, so that each time one man talks to another, or each time a man looks into himself, he is essentially communicating with God. Thus, because man is God and God is man, the people are the church. The church is not defined as the place where people go to worship.

Marijuana is the sacrament of the church. The Coptics believe that marijuana opens the spirit to a greater communication with God. The use of marijuana is absolutely integral to the beliefs and practices of the church. "You cannot be a Coptic unless you partake on the sacrament, and the sacrament is marijuana. Without marijuana there is no religion.

The Coptics do not use marijuana for the purpose of becoming intoxicated or "high." Coptics oppose the recreational use of marijuana which they regard as sinful.

Members of the church are subject to a rigid set of injunctions. For example, drinking alcohol and dancing are forbidden. Coptics adhere to the law of Leviticus regarding food. Women are segregated from the rest of the Coptic community during their menses and after child birth. Some members do leave the church because of their unwillingness or inability to abide by its structures.

Dr. George C. Bond is a doctorate in Anthropology, a member of the faculty at Teacher's College at Columbia University, Department of Philosophy and Sciences in the program of Applied Anthropology. His sub-specialty is in the area of religion and politics. Dr. Bond concludes that the practices and doctrine of the Ethiopian Zion Coptic Church constitute a religion.

Laurenton Dickens of Jamaica, an elder of the Ethiopian Zion Coptic Church, has been smoking marijuana on a daily, almost constant basis for more than fifty years. Dickens instructed the Petitioner[4] in the teachings and ways of the Coptic Church, including how to smoke marijuana. Dickens confirmed the doctrine and practices of his religion in theological terms.

"The term 'free exercise' necessarily implies action, not merely thought processes. It mandates protection

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[4]Thus it is noteworthy that the defendant, who joined the Coptic Church in 1971, remains a member to this day. (T. p. 464).

from action which springs from religious belief as well as protection from belief itself." Worthing, *"Religion" and "Religious Institutions" Under the First Amendment*, 7 Pepperdine L.Rev. 313, 315 (1980).

In *Wisconsin v. Yoder*, 406 U.S. 205, 215, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) this Court held that conduct which is an inseparable part of an individual's sincerely held religious beliefs can be forbidden only where the state shows an interest "of the highest order." This Court emphasized, "(T)here are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the state to control, even under regulations of general applicability," 406 U.S. at 220 and unless the religious conduct poses "some substantial threat to public safety, peace or order," it cannot be prohibited or penalized. *Id.* at 230.

The nature of the government's burden in this case was defined in *Sherbert v. Verner*, 374 U.S. 398, 406, 83 S.Ct. 1790, 10 L.Ed.2d at 965 (1963). In holding that a Seventh-Day Adventist could not be denied unemployment compensation because of her refusal to work on Saturdays, this Court declared that a religious practice could be penalized only if the state could show "the gravest abuse, endangering paramount interests . . ." It was insufficient, this Court held, to show "merely . . . a rational relationship to some colorable state interest . . ." *Id.*

Yoder, is foursquare to the Petitioner's claims here. The question in *Yoder* was whether the State could enforce its mandatory education laws, requiring attendance of all children until the age of 16, against

the members of the Amish Religion who refused on religious grounds to send their children to school beyond the eighth grade. The Amish objection to education of their children beyond the eighth grade was "firmly gounded in . . . central religious concepts." 406 U.S. at 210. They believed that education beyond the eighth grade placed children "in an environment hostile to Amish belief," *Id.* at 211, that it removed children from their community during the period of their life when they must "acquire Amish attitudes" and "interposed a serious barrier to the integration of the Amish child into the Amish religious community." *Ibid.* Expert testimony also showed that requiring attendance of Amish children at school beyond the eighth grade would "ultimately result in the destruction of the Old Order Amish church community as it exists in the United States today." *Id* at 221.

The court described the Amish view on education as "not merely a manner of personal preference, but one of deep conviction, shared by an organized group and intimately related to daily living . . . (T)he Old Order Amish religion pervades and determines virtually their entire way of life, regulating it with the detail of the Talmudic diet through the strictly enforced rules of the church community. *Id.* at 216. The court concluded that to require Amish children to attend school beyond the eighth grade would "contravene . . . the basic tenents and practice of the Amish faith . . .," *Id.* at 218, and "gravely endanger if not destroy the free exercise of respondents' religious beliefs." *Id.* at 219.

The State of Wisconsin had asserted that its "interest in universal compulsory formal secondary education to age sixteen . . ." was paramount. This Court refused

to accept the State's "sweeping claim," holding instead that it "must searchingly examine the interests that the State seeks to promote by its requirements for a compulsory education to age 16, and the impediment to those objectives that would flow from recognizing the claimed Amish exemption . . ." (*Id.* at 221); and concluded that, as important as that policy was, "it would require a more particularized showing from the State . . . to justify the severe interference with the religious freedom . . .". *Id.* at 227.

At bar is a religion within the meaning of the First Amendment which requires the use of marijuana as a central, essential and indispensable aspect of its practice.

The 3½ pounds of marijuana which the Petitioner was convicted of importing and possessing was given to him to be used solely for a divine purpose. A priest of the church, the Petitioner testified that he imported and possessed the marijuana so as to partake of this sacrament as his religion commands him to do. Without dispute Petitioner showed that his intended use of *this particular quantity of marijuana* was "firmly grounded in . . . his central religious beliefs."

The Petitioner sufficiently proved that marijuana "prevades . . . virtually (his) entire way of life," its use being intertwined with "the strictly enforced rules of the church community." *Yoder, supra,* 404 U.S. at 216. Not only does it play a critical role in the process of initiation into the church and in the formal worship services, but because God is within every man, there is total integration of the members' religious and secular lives. The principal sanction for violating a scriptural injunction is withdrawal of the right to smoke it.

If members of the Ethiopian Zion Coptic Church are prohibited from using marijuana, it would not just "gravely endanger . . . (but would) destroy the free exercise of . . . (their) religious beliefs." *Id.* at 219. To deny marijuana to members is to effectively isolate them from the community life of the church. Quite simply, w..hout marijuana the Coptic Church members cannot practice their religion.

Since the Petitioner demonstrated that the use of marijuana is an inseparable part of his sincerely held religious beliefs, the burden shifted to the government, to show that his use of marijuana posed a substantial threat to public safety, peace or order, endangering paramount interests. *Wisconsin v Yoder, supra,* 408 U.S. 205 at 230; *Sherbert v. Verner, supra,* 374 U.S. at 406. The evidence and argument presented in Part I of this brief, *supra,* pertaining to the relative harmlessness of marijuana, becomes pertinent to this issue as well as disqualified the government from meeting its burden. Three states, California, Arizona and Oklahoma, have allowed proscribed substances' use in church practice. *People v. Woody,* 40 Cal. Rptr. 69, 394 P.2d 813 (1964); *State v. Whittingham,* 19 Ariz. App. 27, 504 P.2d 950 (1973); *Whitehorn v. State,* 561 P.2d 539 (1977) use of peyote by members of the Native American Church.

> "We know that some will urge that is is more important to subserve the vigorous enforcement of the narcotic laws than to carve out of them an exception for a few believers in a strange faith. They will say that the exception may produce problems of enforcement and that the dictate of the state must overcome the beliefs

> of a minority of Indians. But the problems of enforcement here do not inherently differ from those of other situations which call for the detection of fraud. On the other hand, the right to free religious expression embodies a precious history of our heritage. In a mass society, which presses at every point toward conformity, the protection of a self-expression, however unique, of the individual and the group becomes ever more important. The varying currents of the subculture that flow into the mainstream of our national life give it depth and beauty . . ." *Id.* at 821

The Petitioner is entitled to the same constitutional protections by the federal judiciary to the charge of either or both importation or simple possession of the 3½ pounds of marijuana.

Also on the authority of *Yoder*, the Petitioner had a First Amendment right to defend himself at trial upon the grounds that his use of marijuana is an inseparable part of his system of sincerely held religious beliefs, and to show that its use within that system poses no threat to the public safety, peace or order. Such a defense, in essence, raised the *factual* issue of whether the 3½ pounds of marijuana was to be used for religious use or for illicit use. Such an issue is one for the jury to resolve, just as in any defense that raises disputed issues of fact. See, e.g. *Pierre v. United States*, 414 F.2d 163, 166 (5th Cir. 1966) (entrapment defense); *Smith v. Smith*, 454 F.2d 572 (5th Cir. 1971) (alibi defense); *United States v. Guanti*, 421 F.2d 792 (2nd Cir. 1970) (defense of Statute of Limitations); *United*

States v. Davis, 595 F.2d 7 (5th Cir. 1979) (insanity defense). As the United States Court of Appeals for the Fifth Circuit stated in *Roe v. United States*, 287 F.2d 435, 440:

> "No fact, not even an undisputed fact, may be determined by the judge. The plea of not guilty puts all in issue, even the most patent truths. In our federal system, the trial court may never instruct a verdict either in whole or in part."

At least, therefore, these proceedings should be remanded to allow the Petitioner fundamental rights via the Fifth Amendment's Due Process Clause, to present to the fact finders his First Amendment defense.

The evil which has been condoned by the decision below is plain. The Petitioner seeks no more than fundamental fairness in the application of the mandate of this Court in its interpretation of the Free Exercise Clause of the First Amendment as this Court itself would render. No less is expected within the federal criminal process. Because of the error as outlined above and the reasons for granting this writ, this petition is deserving of review by this Court.

CONCLUSION

For each and all of the foregoing reasons, it is respectfully submitted that a writ of certiorari should be granted by this Court.

Respectfully submitted,

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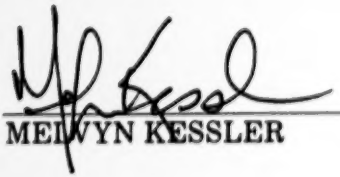
BY 
MELVYN KESSLER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was mailed this 29th day of November, 1982 to: Solicitor General of the United States, Department of Justice Building, Washington, D.C. 20530.

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